No. 91-1524

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

FRANK J. ESCHBERGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, Frank J. Eschberger, objects to the assertion that the normal side-to-side movement of non-defective couplers is so great that there is a frequent need for non-defective drawbars to be realigned in order to effect the coupling that must occur automatically under 45 U.S.C. §2. A more appropriate question presented is:

Does Section 2 of the Safety Appliance Act continue to impose liability regardless of fault or of proof of defectiveness of equipment if a coupling does not take place without a worker going between the cars, as long as one coupler is in the open position?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Whether or not petitioner or the government has promulgated rules for employees to follow in the event 45 U.S.C. §2 is violated is irrelevant. This statute, as this Court has previously held, imposes absolute liability on its own terms without regard to proof of negligence, so the rules cited by petitioner at pages 5-6 of the petition cannot be used to negate liability under the statute.

Respondent testified that the drawbar and its surrounding housing were defective (R. 681-682, 698-699, 714-716, 1135, 1138-1139) (Respondent's Appendix [hereinafter RA] RA3-RA7, RA9). He merely testified on cross-examination that he found no mechanical defect with the car as a whole. Petitioner produced no evidence whatsoever that the drawbar of the accident railroad car was "slewed" over to one side before it came in contact with the next car. Petitioner failed to inspect the accident car for defects, in violation of its own rules (R. 404, 406-408, 1604, 1605) (RA1, RA10). Since there was no testimony of any drawbar misalignment prior to contact with the next car, and since respondent could not prove that this drawbar and coupler were not defective without inspection, the trial court properly held that there had been no proof sufficient to justify submission of a misaligned drawbar defense to the jury. The Appellate Division, Fourth Department, likewise held that petitioner had failed to prove its entitlement to such a defense, if it exists.

ARGUMENT

POINT I

THE INSTANT CASE DOES NOT PROVIDE A RIPE OPPORTUNITY TO DETERMINE THE EXISTENCE OF A DRAWBAR MISALIGNMENT DEFENSE TO THE FEDERAL SAFETY APPLIANCE ACT.

The instant case does not present a ripe opportunity to decide whether a "misaligned drawbar defense" to liability under 45 U.S.C. §2 exists, contrary to the assertions made by petitioner.

The courts below have already determined that petitioner was not entitled to assert a misaligned drawbar defense, if such defense exists.

> Even if we were to recognize a misalignment defense to FSAA (Federal Safety Appliance Act), as urged by defendant, we conclude that defendant failed to meet its burden of proving that the misalignment of the drawbar was not the result of an equipment defect (see *Maldonado v. Missouri Pacific Railway Co.*, 798 F.2d 764, 770, cert. denied 480 U.S. 932).

Eschberger v. Consolidated Rail Corporation, _____ A.D.2d _____, 572 N.Y.S.2d 539, 540 (4th Dept. 1991) (Petitioner's appendix page 4a).

The *Maldonado* court recognized that the fact that couplers are so misaligned that an automatic coupling cannot be effected may, in itself, be evidence that the drawbar is defective.

> Evidence that the drawbars were misaligned so as to prevent coupling places a burden on the railroad to produce evidence tending to show a separate cause for the failure to couple. This is so because a failure to couple due to a deficiency in the equipment, such

> as a drawbar with more lateral play than is appropriate for normal operation, clearly amounts to a violation of the FSAA.

Maldonado, supra, 798 F.2d at 768.

Since misalignment may, in itself, be evidence of a defective drawbar, the *Maldonado* case would require affirmative proof that the drawbar was not defective. Petitioner could not meet that burden in the case at bar.

For this Court to make a pronouncement in the instant case concerning the existence of a misalignment defense would amount to nothing more than the issuance of an advisory opinion, since it has already been determined that petitioner failed to prove facts sufficient to apply it. This Court has previously stated that overseeing the resolution of factual issues by the courts below is not a goal to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts" *United States v. Johnson*, 268 U.S. 229, 227 (1925).

Under similar circumstances, this Court denied certiorari in *Maldonado v. Missouri Pacific Railroad Co.*, 798 F.2d 764 (5th Cir. 1986), cert. denied 480 U.S. 932 (1987).

The statements in the *Maldonado* case concerning the existence of a misalignment defense were merely dicta, because the *Maldonado* court held that even if the existence of a misalignment defense was conceded for the purposes of argument, there was no proof of such misalignment before the cars came together:

> Here there is no evidence suggesting a cause or explanation for misalignment of the drawbar (or even that the drawbar was misaligned). Therefore, we do not have to decide whether Missouri Pacific, with appropriate evidence, could have raised a

> defense of misalignment, because Missouri Pacific did not produce any evidence that would sustain an instruction on such a defense.

Maldonado, supra, 798 F.2d at 768.

Similarly, this Court need not determine when, if ever, a railroad may rely on drawbar misalignment as a defense because both the trial court (R. 2488-2497, 2500-2505) (RA11-RA21), and the Appellate Division correctly held that there was no evidence to justify the giving of a "misalignment defense" charge in the instant case. There was no evidence put forward in the case at bar that the drawbars were misaligned prior to the impact between the cars in question. Thus, petitioner relies only upon sheer speculation.

By contrast, the case of *Reed v. Philadelphia and New England R.*, 934 F.2d 128 (3rd Cir. 1991) would have presented a ripe opportunity to determine the existence of a drawbar misalignment defense if the *Reed* case had not been sent back for a new trial due to misconduct in summation by defendant's trial counsel.

The plaintiff in the *Reed* case testified that he saw a misalignment of drawbars before the meeting of the two cars (Unpublished District Court Opinion, pages 16-17, RA36-RA37). By contrast, in the instant case, no one testified to the position of the drawbar of the accident car before it came in contact with the car that had preceded it down the hump. Thus, the facts in this case are in sharp contrast with those of the *Reed* case on the instant issue of pre-contact misalignment.

Contrary to the assertion made at page 7 of the petition for certiorari, respondent testified that the drawbar of the car in question was defective. During cross examination he was only asked if there were mechanical defects in the cars as a whole, not whether there was a defect in the coupler or drawbar. Respondent

testified that he was injured because the drawbar was not only "slewed" all the way to one side of its housing, but it was "jammed" there and was difficult to move (R. 681-682, 698-699, 714-715, 1135) (RA3-RA7, RA9). He was injured when he was making "a sincere effort" to move the jammed drawbar (R. 719-720) (RA7-RA8).

Petitioner's rules provided that after an employee is injured while working on one of its cars, the car shall be inspected. Petitioner failed to inspect the car with this jammed drawbar, contrary to its own rules (R. 404, 406-408, 1604, 1605) (RA1, RA10). Without inspecting the car, petitioner could only speculate that the coupler or drawbar were not defective.

The argument that the failure to couple automatically could only be explained by a "slewing" of the drawbar to one side due to the car going around or stopping on a curve also rests upon nothing more than speculation. There were other cars which went around the same curve and had coupled properly (R. 654-655, 658) (RA2-RA3), which was recognized by the trial court (R. 2493) (RA14-RA15). Respondent had to manually perform coupling on at most two or three of a whole train of cars before his injury. The first car respondent had to manually couple was the eight or tenth from the engine (R. 654) (RA2-RA3). If going around a curve would invariably cause non-defective cars to have slewed drawbars, then none of the cars on the track in question would have coupled. Respondent testified that if a car is going around a curve and is not attached to any other cars, there would be no reason for the drawbar to be "slewed" over to one side (R. 1042-1043) (RA9). There was no proof that the car in question was stopped on a curve.

Thus, the instant case would not be resolved by any pronouncement this Court might make concerning the existence of a drawbar misalignment defense to the

Safety Appliance Act. Rather, the factual findings of the courts below that defendant failed to offer any proof that there was a misalignment of drawbars *before* rail cars come together, and failure to offer any proof that such a misalignment, if any, was not caused by an equipment defect, are determinative.

There was nothing unusual or precedent setting in the manner in which respondent was injured, or in the fact that a recovery under the FSAA was upheld on appeal.

Recoveries to workers who were injured while straining to align misaligned drawbars were upheld in the cases of *Clark v. Kentucky & Indiana Tenn. RR*, 728 F.2d 307 (6th Cir. 1984); *Kansas City Southern Railway Company v. Cagle*, 229 F.2d 12 (10th Cir. 1955), cert. den. 351 U.S. 908 (1956); *Byrd v. Seaboard System RR Co.*, 510 So.2d 156 (Supreme Court of Alabama 1987); *Plouffe v. Burlington Northern Inc.*, 224 Mt. 431, 730 P.2d 1148 (Supreme Court of Montana 1987); *Leveck v. Consolidated Rail Corp.*, 148 Ill. App.3d 118, 498 N.E.2d 529 (Appellate Court of Illinois, First Dept., Fifth Division 1986), leave to appeal denied 505 N.E.2d 354 (Supreme Court of Illinois 1987); *Buskirk v. Burlington Northern, Inc.*, 103 Ill. App.3d 414, 431 N.E.2d 410 (Appellate Court of Illinois, Fifth District 1982), cert. den. 459 U.S. 910 (1982); and *Schaaf v. Chesapeake & O. Ry. Co.*, 317 N.W.2d 679 (Court of Appeals of Michigan 1982), cert. den. 464 U.S. 848 (1983).

As may be seen from the above, a railroad's absolute liability to a railroad worker who is injured, not by a moving car but while moving a drawbar of a stationary car, is not some kind of radical departure from established case law under FSAA §2, as is implied by petitioner. Indeed, as is explained below, it is certain statements in the *Maldonado* and *Reed* cases that are completely at odds with all prior precedent.

POINT II

THERE IS NO "MISALIGNED DRAWBAR" DEFENSE TO THE FEDERAL SAFETY APPLIANCE ACT.

The existence of a drawbar defense would be contrary to the very motive of the Safety Appliance Act. The Safety Appliance Act is an absolute liability statute, and this Court has noted on many occasions that imposition of liability under it is not based upon proof of negligence on the part of the railroad.

> As we said in *O'Donnell v. Elgin, Joliet & Eastern R. Co.*, 1949, 338 U.S. 384, 70 S.Ct. 200, and the *Carter* case [*Carter v. Atlanta & Saint Andrews Bay R. Co.*, 338 U.S. 430, 70 S.Ct. 226], the duty under the Acts is not based upon the negligence of the carrier, but is an absolute one requiring performance 'on the occasion in question' (174 F.2d 489).

Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96, 98, 70 S.Ct. 509, 510 (1950).

Liability under Section 2 of the Safety Appliance Act is not premised upon proof of defective equipment.

> "[W]e held that plaintiff does not have to show a 'bad' condition of the coupler she was entitled to a pre-emptory instruction that to equip a car with a coupler which failed to perform properly 'in the switching operation' was in violation of the Act, which rendered defendant liable for injuries proximately caused therefrom, and that neither evidence of negligence nor of diligence and car was to be considered on the question of liability. 'Further, we said a failure of equipment to perform as required by the Safety Appliance Act, is in itself an actionable wrong . . .' "

Affolder, supra, 339 U.S. at 99.

The only exception to the rule of absolute liability for failure to perform is a situation in which the couplers of the two cars that are sought to be coupled together are both closed. *Affolder, supra.*

A coupling should take place as long as one of the two couplers is open. In the case at bar, one of the couplers was open when plaintiff first noticed the failure to couple (R. 685-686) (RA4).

A situation in which a car fails to couple, allegedly due to drawbar misalignment, is distinguishable from a situation in which the failure to couple is due to two closed couplers.

First, a closed coupler can be opened from the side of the car by lifting the lift handle at the side of the car without going between the cars. A closed coupler can result not only from defective equipment but from a failure on the part of an injured plaintiff's co-employee on the railroad to follow proper procedure. Thus, a defendant railroad's victory in defeating a Safety Appliance Act claim because of two closed couplers is likely to be a Pyrrhic victory, because a two-closed coupler situation, in which one of the couplers was not defective, would almost always constitute a violation of the Federal Employers Liability Act, 45 U.S.C. §51, due to negligence of a co-employee in failure to follow proper de-coupling procedures at the top of the hump.

Second, a two-closed coupler situation is distinguishable because the failure to couple due to misalignment is, in itself, evidence that the drawbar of a coupler is out of repair, while a two-closed coupler situation is just as consistent with failure to follow proper procedure as it is with a coupler defect. This point was made in the case of *Clark v. Kentucky & Indiana Terminal Railroad*, 728 F.2d 307, 312 (6th Cir. 1984):

K & I contends, citing *Affolder* and *Cobb*, that a misaligned coupler is no basis to impose liability under §2. But in neither *Affolder* nor *Cobb*, did the facts suggest any issue concerning alignment of the two couplers. Nor did those cases reach a designation as to whether a misaligned coupler violated §2. *Affolder* merely held that a failure to couple due to two closed couplers was not a violation of §2; *Cobb* adopted the *Affolder* language. Important distinctions between closed and misaligned couplers argue against the application of *Affolder* to the latter condition.

A coupler typically has a lateral play of one to one and one-half inches on either side that permits movement of coupled cars around curves. But a coupler's lateral motion may be increased by wear. *Hallada v. Great Northern Railway*, 244 Minn. 81, 69 N.W.2d 673, 680, cert. denied, 350 U.S. 874, 76 S.Ct. 119, 100 L.Ed. 773 (1955). "[T]he customary play of an inch or a little more does not interfere with . . . coupling upon impact." *Hampton v. Des Moines & Cent. R. Co.*, 65 F.2d at 909. But "[i]f the couplers are out of alignment beyond the normal play, the coupling will not make automatically even though both knuckles are opened." *Chicago, St.P., M. & O. Ry. Co. v. Muldowney*, 130 F.2d at 974-975. In contrast, a coupler knuckle is by design either open or closed. *Hallada*, 69 N.E.2d at 690. Unlike a misalignment, the knuckle's position is not attributable to aging equipment.

As importantly, should both couplers be found in the closed position before an attempted coupling, a worker can open a knuckle by operation of the lift lever on the side of the railroad car. In order to correct a coupler so out-of-line that a successful coupling is impossible a railroad worker is required to step between the cars and make the adjustment. "In light of these differences, it is well to keep in mind that one of the basic purposes of the [FSAA] is to require the automatic coupling and uncoupling

without the necessity of men going between the cars." *Hallada*, 69 N.W.2d at 680. See also *Schaaf*, 317 N.W.2d at 681.

Consistent with overwhelming case law, then, we hold that a person injured while attempting to align a coupler in order to effect a coupling may recover through §2 of the FSAA.

As was noted in the decision of the Appellate Division, Fourth Department in the instant case, the majority of courts "... which have interpreted FSAA have concluded that the failure of railroad cars to couple automatically because drawbars were misaligned, imposed absolute liability upon the railroad (see *Metcalfe v. Atchinson, Topeka & Santa Fe Railway*, 491 F.2d 892, 893 [10th Cir. 1974] and cases cited therein)." *Eschberger v. Consolidated Rail Corp.*, _____ A.D.2d _____, 572 N.Y.S.2d 539, 540 (4th Dept. 1991).

One of the cases relied upon by defendant, *United Transportation Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983) is actually favorable to respondent's position. At most, the *Lewis* case establishes that there is no such thing as a technical or abstract violation of the Safety Appliance Act, divorced from an actual injury due to the necessity to go between the cars after an actual failure to couple automatically.

The *Lewis* court dealt with the propriety of a rule of practice, requiring workers to reach in between cars with a hook to fully open the knuckle of a coupler prior to sending the car down the "hump" to automatically couple with another car. The purpose of this procedure was to ensure that railroad workers would not have to go between cars to manually manipulate drawbars, as plaintiff in the case at bar was doing when he was injured.

The *Lewis* case was not a drawbar misalignment case, but the *Lewis* court clearly stated that there was no misalignment defense of the sort advocated by petitioner in the instant case:

> At the same time, however, *actual failure* to couple automatically because of a misaligned drawbar or a closed coupler is sufficient to establish liability under Section 2. See *Metcalfe v. Atchison, Topeka & Santa Fe Ry., supra*, 491 F.2d at 896 and cases cited therein. This is because Congress imposed on railroads a duty not just to provide proper equipment, but also to guarantee its performance. See *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950); *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236 (1949); *Delk v. St. Louis & San Francisco Ry.*, 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 1590 (1911). And FRA continued to adhere to this view of the railroad's responsibility. (See brief for appellees at page 35).

Lewis, supra, 711 F.2d at 251, footnote 39 (emphasis in original).

It should be noted that footnote 39 of the *Lewis* case refers to liability under FSAA being imposed because of a closed coupler, meaning one closed coupler. This is not inconsistent with the case of *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 70 S.Ct. 509 (1950), in which an exception for liability is found if a coupling fails as a result of *two* couplers being closed.

Neither the *Maldonado* nor the *Reed* case provides grounds for granting certiorari because they are merely aberrations from all other case law on the subject and because both are fatally flawed by a fundamental misreading of the *Lewis* case.

Both the *Maldonado* and *Reed* courts failed to recognize that footnote 39 of the *Lewis* court's opinion precluded the existence of a misalignment defense because railroads guarantee the automatic performance of their couplers under FSAA, and that if couplers fail to couple automatically, workers go between the cars at the railroad's risk.

Until the *Maldonado* case was decided, every appellate court faced with the issue had decided against the existence of a misaligned drawbar defense. See *Schaaf v. Chesapeake & O. Ry. Co.*, 317 N.W.2d 679, 680-681 (Court of Appeals of Michigan 1982), certiorari denied 464 U.S. 848 (1983).

To this day, there has not been a case upheld on appeal in which a railroad has been absolved of liability due to the application of a misaligned drawbar defense. The pronouncements concerning the existence of a drawbar defense were not dispositive in either the *Reed* case or the *Maldonado* case.

On four prior occasions, after considering petitions for certiorari in connection with the *Maldonado, Buskirk, Schaaf,* and *Cagle* cases, this Court has declined invitations to rule on the issue of the existence of a drawbar defense. Petitioner has not advanced any persuasive reasons why certiorari should be granted in the instant case.

In an argument not made to the courts below, petitioner now asserts the alleged absence or "experimental" nature of "automatic realigning" devices for the drawbars of couplers (petitioner's brief page 15, footnote 14). However, the allegedly rare nature of self-centering drawbars is belied by the facts of the instant

case, because cars on the same track as the car involved in plaintiff's accident were equipped with self-centering drawbars (R. 621-622, 671) (RA2, RA3).

Eventually, more and more railroad cars will be equipped with self-centering drawbars, which would negate any alleged misalignment that results from cars going around curves. Railroads would be less inclined to spend the money to retrofit their cars with self-centering drawbars, which would prevent injuries, if they are convinced that if workers injure themselves moving these heavy drawbars, they can defeat their claims in court through application of a misaligned drawbar defense. Thus, the purpose of the FSAA, protection of railroad workers, would best be served by denial of certiorari in the case at bar.

By spending money on self-centering drawbars which prevent injuries rather than on litigation after injury occurs, the purpose of the statute would be advanced and the question of the existence of a drawbar defense would eventually become moot.

The rule discussed in the petition, 49 C.F.R. 218.39, is totally irrelevant to this case because it was not effective until June 30, 1984 (petitioners appendix page 37a), the year after plaintiff's accident. In any event, it should again be noted that it is not just going between the cars that establishes a violation of the Safety Appliance Act, it is the occurrence of any injury due to the necessity of going between the cars as a result of a failed coupling that establishes a violation of 45 U.S.C. §2.

CONCLUSION

The petition for certiorari of Consolidated Rail Corporation should be, in all respects, denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

Excerpts of Testimony of John C. Wood

TESTIMONY OF JOHN C. WOOD—
DIRECT EXAMINATION

Q. Now, Mr.—Mr. Wood, if there has been an injury involving a piece of equipment, or train, it is the obligation of the railroad to make an inspection of that car and inspection of that equipment, is that not so? A. That's the normal and customary procedure, yes. (R. 404).

* * *

Q. Okay. And did you—did you, yourself, every make any inspection of this car or piece of equipment? A. No.

Q. Did you ask anyone else to make any inspection of this car or piece of equipment? A. No. (R. 406).

* * *

Q. So—sure. After there's a personal injury accident, you've agreed that it's proper—that the proper requirement of the railroad rules call for inspection of the piece of equipment, is that right? A. Yes.

Q. Okay. And after the—the inspection is done, that if, in fact, there's anything wrong with the equipment or anything like that, that's to be marked down, is that right? A. Yes.

Q. And if, in fact, there's nothing wrong with it, the word none is required to be written in, is that true? A. I would say that would be the appropriate word.

Q. And in this—in the form here, that is left blank, is that right? A. Yes. (R. 407-408).

Excerpts of Testimony of Frank J. Eschberger

Q. Okay. Now, Mr. Eschberger, the car that was most furtherly westerly that we're talking about, that had the drawbar on the east side of that most westerly car, what type of a drawbar and drawhead—and drawhead did that have on it? A. Well, that was a short drawbar and—and—and I believe it was—I don't believe, I know it was a self-centering drawbar. Short self-centering drawbar, I suppose you would call it.

Q. Okay. Now, Mr. Eschberger, tell us what—what do you mean by a self-centering— A. Well, there's drawheads that have—it's a shank like this, and then it will have spring in the pocket, it will have a spring on each side. If this drawhead is moved, that the spring will bring it back to center. (R. 621-622).

* * *

A. Like I say, Gerry Lakes told me to—he'd meet me on sixty-one, walk over, meet me on sixty-one.

Q. Lakes—Mr. Lakes was the conductor? A. Yes. So I—I walked directly across the—the rails of sixty-one to the next pathway that you would walk in to do your duties, and I waited there till the engine got down to where I was standing. I boarded the engine there and went down, oh, eight to ten car lengths further, I was on the front of the engine, and I pulled the lift lever on the engine because the knuckle was closed, so I pulled the lever, and it automatically opens the knuckle, and when I come to the first car on sixty-one, which is probably eight to ten cars down in there, I told the engineer to ease up and stop, and then at that point I stepped off the engine and told him to stretch 'em west, stopped 'em, and started to walk in an easterly direction down the pathway.

Q. When you say stretch 'em west, what does that mean? A. The engine will pull down any cars that he has ahold of.

Q. Back towards Bailey, right? A. Right.

Q. Bailey Avenue. Okay. After that, what did you do, Mr. Eschberger? A. I walked down the track to the east, watching for openings, or cars that wasn't coupled together.

Q. In other words, what—what now, Mr. Eschberger, what were you—what were you told to do? What was your— A. I was told to couple the track. (R. 654-655).

* * *

Q. Okay. And so, Mr. Eschberger, then go ahead and tell us what you saw and what you did, sir. A. Oh. I think I left off where I did make a coupling, maybe—maybe two or three, I don't remember how many just—just how many I made down to—how should I put it, down to the car that was involved in this particular situation we're here for. (R. 658).

* * *

Q. Okay. Now, the east and—the east end of this westerly car, the west car from the lumber car, what was the situation as far as that drawhead is concerned? A. Well, the drawhead was centered, it was—I believe it was self-centering, if I remember correctly, and the knuckle was closed. I pulled the—well, before I did anything, I called the west end yardmaster for a spike on a track, or a peg, which is the same thing. That's a—sort of a protection again. Well, getting back to that car, the drawhead was on center all right, but the knuckle was closed. I—I pulled— (R. 671).

* * *

Q. All right. Now—so now go ahead, Mr. Eschberger, and tell us then when that car came to rest, and you had this proper space between, what did you do? A. Well,

when the car stopped moving, I had the engine stopped, and the track was pegged, I observed the drawhead was completely into the—the—pushed over to the south end of the pocket. Completely over—

Q. Uh-huh. A. —to the south side of the pocket I should say. (R. 681-682).

* * *

Q. And then if the drawbar—if the drawbar is centered, and you have the—the opposite drawhead working with it in proper alignment, what is the effect of that? A. Well, it's a coupling effect. It would be just like this, two knuckles—I did open the other knuckle for—simply because when you use two open knuckles, it's easier and more sure of making a coupling, so as I said, I had that open, now I centered this, and I brought the engine—well, at that time I didn't because of this car rolling free, I knew there was a problem on the other end, but I don't want to get ahead of myself. When I finally did bring the engine ahead, he shoved the cars that we had ahold of, being this side, he shoved them. When the drawheads come together, the knuckles closed, and of course, the pins dropped and the coupling was made. (R. 685-686).

* * *

A. Well, I put—first I put my back to the car, I put my left foot on the inside of the south rail, this is the rail that the drawbar was closest to, and the right one on the outside of the rail.

Q. Mr. Eschberger, could I—could I just—I hate to interrupt you, sir, but you said you pushed—you put your back to the car. Now is that what you meant? A. Yes.

Q. Okay. All right. A. Yes.

Q. Just so we understand. A. Now the reason for putting your feet on the inside and outside of the rail was, your feet are spread and it gives you a little more balance, and you are not allowed to step on a rail, this in in the rules, you are not allowed to step on a rail, so therefore, with the amount of room, I put one foot on the inside, my right foot to the outside of the south rail, my back to the drawhead. I got ahold of the drawhead—can I demonstrate or—

Q. Well, with the permission of the Court you can.

THE WITNESS: Your Honor, may I demonstrate or not?

THE COURT: Certainly.

[523] THE WITNESS: I'm going to use this as the drawhead. I put my back to it, and I put my hand under it, grabbing hold of this drawhead, bending my legs slightly, is when—when I pull up and push in one motion. Your legs—I suppose everybody knows this, your legs are the most powerful part of your body, and any time you get into lifting motion, this is the proper way to lift, and so all in one motion, I pulled up and pushed back. The first time I pulled up and pushed was without much force. That's when I knew the drawhead was—I called it jammed, I believe. It was very hard to move. (R. 698-699).

* * *

Q. All right. Now, Mr. Eschberger, have you in prior—in prior before this accident, before your accident that night of August 6th, 1983, had you—you told us you had occasion to move these drawbars, is that right? A. Yes.

Q. And would some of them you have some difficulty with in moving, and require a sincere effort on your part to move them? A. Yes.

Q. And Mr.—Mr. Eschberger, what would cause any little jamming to take place? A. Well—

MR. GRIFFIN: Objection. Repetitious. We've been over this.

THE COURT: Overruled.

THE WITNESS: Well, sometimes these drawbars when they bypass, they're riding on a carrier iron, and sometimes, there's a word, of course, but I think I can explain it, by through the impact, there will be a little spur, or nick that is caused from the impact.

MR. GRIFFIN: Your Honor, I move to strike all this, no foundation, it's speculative, it's not related to any event in this claim, and I move to strike that.

THE COURT: Overruled.

MR. GRIFFIN: And no qualification.

Q. Mr.—Mr. Eschberger, has this been your [539] knowledge and experience from—from doing this work for this number of years that you talked about prior to August the 6th, 1983? A. Yes. I—I worked thirty years and I was a steady worker.

Q. And— A. Passed—a little over thirty years.

Q. And from your experiences in the past, when you would run into these drawbars that were slewed and jammed to some degree, can you tell us whether or not you found out that there was the little burr in the area?

MR. GRIFFIN: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, I have.

MR. BELTZ: Okay.

THE WITNESS: I have seen—

MR. BELTZ: And did that burr prevent you from straightening those drawbars out and setting it up so it could be coupled?

MR. GRIFFIN: Objection.

THE COURT: Overruled.

MR. GRIFFIN: It's opinion evidence, if it please the Court.

THE WITNESS: It all depend how bad it was spurred or—or nicked or—that would depend on that.

Q. Yeah. Can you tell us whether or not you—you generally were able to move these with the nicks in them and center them? A. If it was a slight nick, you—it was within my means to move them.

Q. Right. A. There were guys, small people, that couldn't move them, you know. Where—

Q. But any rate, your experience was that you could—you could center them if they had these nicks in them, is that right? A. Yes. Yes.

Q. And to do that, would it require some good, solid effort on your part in order to do it? A. Yes. (R. 713-716).

* * *

[543] Q. And so you were telling us, Mr. Eschberger, your position and you were telling us what you did. Could you just go ahead and tell us what you did now? A. As to moving the drawhead?

Q. Right. A. Put my back to it, planted my feet as firm as possible, in a—I say pulling, as to pulling up, or lifting motion, and pushing all in one motion mind you, you're doing this in one motion, your—you—the object is, if there is a little nick on that carrier iron, you—you don't lift five hundred pound, or thousand pound piece of iron, but you take weight off it, you take as much weight off of it as possible, and that way, it will—it will pass over this nick, and it will move more freely.

Q. And so as you were pushing in this—lifting and—in the fashion that you talked about, and moving, go ahead and tell us what happened. A. Well, I—when you first get in there, you don't put everything you have into it, you don't know how hard or—it's going to be to move, so you apply—you start by applying a little pressure, and again, you—you should use your legs whenever you're lifting, and you apply a little pressure, and you feel now it's not going to move, so you apply a little more pressure, within your means, you're not [544] going to try to strain yourself to move these things, you're going to be within your means, I mean you—you'd have—I don't know what to say, you'd have to be foolish—

Q. Well, we better not— A. —to overdo it.

Q. Okay. All right. So at any rate, you tried to do in the method in which you understood was the proper method, is that right? A. Yes.

Q. Okay. And then try to tell the Court and jury, Mr. Eschberger, in your own way what happened. A. Okay. I started out trying to move it with easy motion, I found out it wouldn't move, so I put more pressure on my legs, and when I did, this drawhead come loose and swung completely to the other side, I was going back, and in order to retain my balance, my right foot was out in front of me and spread apart, and to retain my balance, I had to spin around in a half motion and—and plant my foot—I was at this time when I spun halfway around, I was completely inside the rails, and I don't want to fall down and—rails are hard, they're steel, I don't want to fall on these things, so I got—I got to catch my balance, which I'm sure everybody in this courtroom at one time had an occasion as to where they had to catch their balance— (R. 719-720).

* * *

TESTIMONY OF FRANK J. ESCHBERGER—
CROSS-EXAMINATION

Q. So that my question is, do drawbars move over to [862] one side or the other, get out of center alignment, after having gone around curves? A. After the cars is cut off and they go around the curve?

Q. Yes. A. Not to my knowledge. They're freewheeling going around this curve. I—I don't have knowledge of them just swinging over to one side or the other. (R. 1042-1043).

* * *

TESTIMONY OF FRANK J. ESCHBERGER—
REDIRECT EXAMINATION

MR. BELTZ: Well, let me ask you, Mr. Eschberger, did that drawbar move in a normal fashion or not?

THE WITNESS: No, it didn't. (R. 1135).

* * *

Q. And I don't know, Mr. Eschberger, if I've asked you but what is—what is a burr? Mr. Griffin asked you about a burr. A. A burr?

Q. Yes. In railroad parlance. A. Burr is a piece of metal that is just—oh, how would you say it, humped up, or raised up, and it's—it's on the carrier iron usually. On the carrier iron, that's what the drawbar rides on.

Q. Okay. And what did you say was humped up? A. Little piece of metal on the carrier iron. (R. 1138-1139).

* * *

Excerpts of Testimony of Michael Herr

TESTIMONY OF MICHAEL HERR—
DIRECT EXAMINATION

MR. BELTZ: I'm sorry, Your Honor. I apologize. I'll withdraw it. Mr.—Mr. Herr, I'd ask you to assume, Mr. Herr, that—that Mr. Eschberger's testified that he was injured on the railroad on August the 6th, in the early morning hours of 1983, that he reported it to his trainmaster, who in turn called the—a Mr. Wood, who was the next man in command, and Mr. Wood took Mr. Eschberger to the hospital, stayed with him while he was treated at the hospital, and that Mr. Wood in turn filled out a—a form saying that there was personal injury involved, and saying that he was supposed to go back to the hospital some hours later in that same day, and I ask you, assuming those facts to be true, Mr. Herr, do you have knowledge whether or not there was a requirement under the rules and regulations of Conrail whether or not a—an inspection was required to be made of the car involved?

THE WITNESS: Well, any time there's a personal injury involved, the trainmaster should immediately notify the car department for an inspection of that car, and if my memory serves me right, there's a form that's supposed to be filled out relating to the inspection. (R. 1604-1605).

* * *

Excerpts of Precharge Conference

[2286] MR. BELTZ: Your Honor, twenty-seven, that will be covered in your general charge, I'm sure.

THE COURT: I'm going to so charge, Mr. Griffin. Now twenty-eight, if the Court does not dismiss the Safety Appliance Act, and I did not, so the following instructions are requested.

(a) If the coupler on the railroad lumber car failed to couple automatically at any time because it was not properly set or aligned for coupling, such failure is not a violation of the Safety Appliance Act, and

(b) The mere failure of two cars to couple on impact does not establish a violation of the Safety Appliance Act. If you find that the drawbar was out of line by reason of the car having come around a curve or that it was otherwise not defective, it must be found that it was properly set so that it could couple. If it was not adjusted and aligned as automatic couplers must be in order to function properly, the failure to automatically couple at any point in the prior movement of the car would not be a violation of the Safety Appliance Act.

I—I gather—I gather, Mr. Griffin, that that—what you're requesting is basically in [2287] keeping with your motion and the Maldonado versus Missouri Pacific Railroad case. Is that substantially correct?

MR. GRIFFIN: That's true, Your Honor.

THE COURT: Yes.

MR. GRIFFIN: And you might also want to consider, because they're all related, our requests twenty-nine, thirty, and thirty-one of the supplemental.

THE COURT: Oh.

MR. GRIFFIN: Because it's—

THE COURT: Wait till I see that.

MR. BELTZ: Just—

THE COURT: Oh, I'll get to those.

MR. GRIFFIN: Because it's the same subject matter.

THE COURT: Okay.

MR. GRIFFIN: About automatic couplers.

THE COURT: Well, it's not the same subject matter, is it? Twenty-eight (a) doesn't talk about drawbars, it talks about couplers. That's—that's precisely—I thought the case you gave me, Mr. Griffin, was an excellent case, that Maldonado case. Specifically, on page seven sixty-seven, if [2288] all counsel have their copy, this is Maldonado, it's the last paragraph on seven sixty-seven, and it starts out, and I quote, the issue in the present case is whether the District Court erred in instructing the jury that it is a violation of the FSAA, quote, for the railroad to operate a car which has a drawbar sufficiently out of line that it does not couple upon impact, close quotes. Both parties contend that the cars failed to couple because of drawbar misalignment before the impact. Their dispute concerns the legal significance of this theory. Defendant urges us to read Affolder, and Affolder is a very well known determination by the Supreme Court. I thought I had the citation, but in any event—in any event, Affolder—

MR. BELTZ: Your Honor, I have it if you want it.

THE COURT: Yes, I think I see it here. That Defendant urges us to read Affolder to mean that there can be no FSAA violation unless at least one knuckle was opened, and the drawbars were properly

aligned before the attempted coupling. However, we need not determine when, if ever, a railroad may rely on drawbar misalignment because Missouri [2289] Pacific did not produce the evidence that would be required at a minimum to support such a defense, and I close quotes. Now when, as I say, the Maldonado did cite, and cite apparently with approval, that Schaaf case, and the Schaaf case held on page six eighty-one, I quote, Defendant fails to cite, and our research has not discovered, any case holding that drawbars must be properly aligned before a railroad can be found guilty of a violation of the Safety Appliance Act. The case of Affolder versus New York Central, 339 U.S. 96, is distinguishable because that case involved the failure of two cars to couple on impact because a coupler had not been properly opened. There is a crucial distinction between a coupler and a drawbar. A coupler can be opened and closed without the necessity of having someone go between any railroad cars. A drawbar, however, can only be aligned manually by someone pushing it while standing between railroad cars. And of course, what—what happened in—in Schaaf, is that the trial judge, who didn't charge in accordance with that language, his charge was criticized, and a no cause was reversed. In Maldonado, what had [2290] happened was, is that a verdict for the Plaintiff, with the drawbar misalignment language, that verdict was affirmed. And with that—with that being what I perceive to be at least the state of the law as submitted to me by counsel, Mr. Griffin, do you feel that the Defendant is entitled to a charge as stated in paragraph twenty-eight (a)?

MR. GRIFFIN: Yes, Your Honor, because as I have argued and submitted authority to the Court, and as the Maldonado case clearly indicates, and Your Honor read—read the portion, that if the—if the drawbar misalignment was due to some factor other than equipment failure or defect, such as going around a curve, which is the proof in this case, then there is nothing wrong with—you were going to stop me there.

THE COURT: No, I'm going to comment on what you said. You know the proof in this case. The Maldonado, that was your burden.

MR. GRIFFIN: Absolutely, under Maldonado.

THE COURT: You have to show why it didn't couple.

MR. GRIFFIN: And we have showed that.

THE COURT: Why?

[2291] MR. GRIFFIN: Because the Plaintiff—as Your Honor well instructed, we rely on the proof. They put the railroad witnesses on the stand, Your Honor. They put on Herr—

THE COURT: Wait a minute, Mr. Griffin, there were a lot of cars in this train that were being made up that coupled, that went around your curve. This one didn't couple.

MR. GRIFFIN: Well—

THE COURT: Same curve, same track, track—good old sixty-one. And they coupled. And this one didn't. Now, you're saying that because the Plaintiff testified that there was a curve in the track, that that meets the railroad's burden as far as equipment failure or problem?

MR. GRIFFIN: Your Honor, the only explanation—the only explanation given in this case as to the drawbar misalignment was that it went

around a curve, that it was a long car, the—there was only one long lumber car that was on this track. The proof—now if Your Honor is—is ruling on the basis of a failure of explanation, that we haven't met our burden, I don't know what more I could do, because the people who had the [2292] knowledge and explanation came in and offered that explanation.

THE COURT: I'm not sure that's so, but that's—

MR. GRIFFIN: I have—I secured the—the testimony of the witness Wood, the Plaintiff asked all those questions.

THE COURT: I understand that.

MR. GRIFFIN: The Plaintiff.

THE COURT: I understand that. It's not the Plaintiff's burden. Under Maldonado, it's your burden.

MR. GRIFFIN: But what difference, since they've done it.

THE COURT: That's your—that's your determination. Is that the way you read Maldonado? It's not the way I read your case.

MR. GRIFFIN: Your Honor—Your Honor—if—if the Plaintiff as you instructed—as you instructed the jury in—in the opening, the precharge conference, the Defendant need not call any witnesses, the Defendant could rely on the proof offered by the Plaintiff.

THE COURT: Oh, certainly.

[2293] MR. GRIFFIN: Right.

THE COURT: For the Plaintiff to establish their case.

MR. GRIFFIN: But the Plaintiff—the Plaintiff established why the drawbar was out of alignment; namely, it went around a curve.

THE COURT: That's what you say.

MR. GRIFFIN: Well, that's what the witness has said.

THE COURT: That's all right.

MR. GRIFFIN: That's the only proof in the case.

THE COURT: That's what I'm saying, that's the only proof in the case.

MR. GRIFFIN: Right. There it was out of alignment because—because of a curve problem. The positive testimony was that there was no defect in the equipment, the Plaintiff's—the Plaintiff has testified that there was no defect, there was no mechanical defect, that he reported no mechanical defect. That's the state of the record.

THE COURT: Oh, I understand. All right.

MR. GRIFFIN: If Your Honor is—let me—I mean they—they proved it, I didn't have to call [2294] the witness. Now, had they not called—had they offered no explanation, had all the Plaintiff come in and said, I came upon—I came upon a slewed drawbar without more, if that's all the Plaintiff proved, but they went on ad nauseam to develop the curves in the tracks, the long lumber car, that—the lateral play moves, and I developed that further on the cross examination, that when the car goes around a curve, it has to move, and when they cut them off at the—and so on, Your Honor, so that's all in the record.

THE COURT: Mr. Beltz.

MR. BELTZ: Your Honor, there was—there was other—other proof in this record with regard to how the drawbar could have been—could have been slewed. Furthermore, Your Honor, in—in the Maldonado case, Your Honor, it says in here that

both parties contend the cars failed to couple because of the misalignment before the impact. Your Honor, we don't have that proof in this case, we don't have that, failed to couple before the—drawbar misalignment before the impact. Your Honor, our case is clearly distinguishable from this, and they haven't cited a single case, Your [2295] Honor, that—that indicates that we don't have a solid case here, not a single case.

THE COURT: I'm not sure Maldonado was distinguishable, but I read Maldonado differently.

MR. BELTZ: Well, really supports our position is what it does. Supports our position.

THE COURT: Mr. Griffin.

MR. GRIFFIN: The proof in this case is that the Plaintiff came upon a slewed drawbar. The proof in this case is that that drawbar got slewed because of a train going around a curve, and therefore, when it came in contact with another coupler, it could not couple because it was not properly aligned. The proof is that there was no defect in the drawbar or the coupling device. The proof is then, Your Honor, that after the Plaintiff lined it up properly, it did couple automatically. That's—that's the state of the proof. Am I wrong in any respect, Your Honor?

THE COURT: I'm going to decline to charge as requested in twenty-eight. And now, that gets us to Court Exhibit 4, and this is the Defendant respectfully requests that the Court have the jury report its reorder—report its reorder— (R. 2488-2497).

* * *

THE COURT: Eleven. What is the total amount, future medical, total amount of pain and suffering Plaintiff will sustain in the future. And I'm not

going—I'm not going to charge present value as we say. Twenty-nine. The mere fact that a drawbar becomes out of alignment in the course of railroad operations, does not constitute a violation of the Safety Appliance Act. Mr. Beltz.

MR. BELTZ: Well, Your Honor, just as a statement, Your Honor, that doesn't make really—make any sense in the context of the case.

THE COURT: Mr. Griffin.

MR. GRIFFIN: I think it's very important and pertinent, Your Honor, because it's part of the foundation for the next instruction, that we don't [2299] violate the law by a drawbar going out of line, we then have a right to straighten it.

THE COURT: That's going to get it right back into that assumption of risk, isn't it? Assumption of risk of employment. The very title of the section.

MR. GRIFFIN: It's not assumption of the risk, Your Honor, I'm saying that we have a right to have our employee, we have a right to center the drawbar, and that we don't violate the Safety Appliance Act when we have somebody do that.

THE COURT: Let me see this.

MR. BELTZ: Your Honor, essentially, that—that's just the Maldonado argument all over again is what you've got, and it's just a sentence is taken out of context, a sentence that Mr. Griffin created or somebody from the office.

THE COURT: I'm looking at Schaaf, and on 680, and I quote, although no Michigan Appellate Court has yet addressed this issue, every other Appellate Court presented with this question has ruled that a misaligned drawbar is in itself enough to constitute a violation of the Safety Appliance Act. In Kansas City Southern versus Cagle, 229 Federal [2300] 2nd

12, it's the Tenth Circuit, 1955 case, the Federal Court of Appeals addressed a factual situation substantially similar to that at bar. There, an out-of-alignment drawbar was in such a condition that it would not automatically couple to railroad cars upon impact. As a result, it was necessary for an employee of the railroad to manually align the drawbar so that the coupling could be made. While doing so, an employee was injured. The Federal Court of Appeals held, quote, without exception the cases have held that operating a car on which the drawbar is so far out of line as to prevent automatic coupling violates the Safety Appliance Act and imposes absolute liability. Footnote omitted, cases cited. And going on, holding—well, I guess I must, in Hallada versus Great Northern, 244 Minnesota 81, holding that it is no defense in an action brought under the Safety Appliance Act, if the failure of drawbars to couple upon impact was caused by misalignment and cites Donnelly versus Pennsylvania Railroad Company, 342 Illinois Appeals, 556. Mr. Griffin.

MR. GRIFFIN: I don't want to be repetitious.

[2301] THE COURT: Schaaf just says the contrary to what twenty-nine requests.

MR. GRIFFIN: But it's—but it's crazy. No, it is. I mean, we have a perfectly good piece of equipment, that piece of equipment has to move laterally. There could—

THE COURT: Wait just a moment, you have a perfectly good piece of equipment. That's where I think under Maldonado you had to offer proof.

MR. GRIFFIN: No. The Plaintiff—the Plaintiff said, I was there, I worked with it, there was—

THE COURT: I remember there was a little burr, and you objected, and I sustained.

MR. GRIFFIN: A burr has got nothing to do with anything.

THE COURT: That doesn't meet your burden under Maldonado.

MR. GRIFFIN: Oh. If—if—Your Honor, we're not in the same ballpark, if you say I didn't meet my Maldonado burden, I mean—

THE COURT: I'm saying that. Let the record reflect I'm saying that, you did not meet your Maldonado burden.

[2303] MR. GRIFFIN: And that's your basis of ruling?

THE COURT: What is my basis for ruling? What does that mean? My basis of ruling, what, on everything I've ruled on since ten o'clock this morning?

MR. GRIFFIN: No, no, I'm not trying to be—in other words, my understanding is, Your Honor, that if I had met the Maldonado burden, your ruling might be otherwise?

THE COURT: It might be, yes.

MR. GRIFFIN: All right.

THE COURT: Yes.

MR. GRIFFIN: Can I address that then?

THE COURT: Sure.

MR. GRIFFIN: Can I address it then? Maldonado says—the context of Maldonado is that a man came in and said, I had a misaligned drawbar and I got hurt.

THE COURT: Right.

MR. GRIFFIN: That was the record in that case.

THE COURT: Correct.

MR. GRIFFIN: And the railroad said well, that doesn't necessarily mean there's anything wrong [2303] with it, the fact that it's out of alignment, and the Court said wait a minute, we don't know why it was out of alignment. You, railroad, you have to come in and show—you have to come in and show why that's out of alignment. That's your burden. And if you show that it's out of alignment for some reason other than a defective device, then the Maldonado, and admittedly, it's—it's not a precise holding, but that's what they're saying, if you come forward, Mr. Railroad, and so that the reason it's not out—that it was out of alignment is not because of a defect, then you have a defense. No question that you have to have that evidence. Now—

THE COURT: Yes, but you see you have to read—you can't just take Maldonado that way, because you have to read Affolder and you have to read your Maldonado case. I mean, you just don't read it alone.

MR. GRIFFIN: Well—

THE COURT: I'm going to decline to—I think the record really reflects your position, and I'm not going to charge twenty-nine. Thirty, Mr. Griffin. The Defendant has a right—I really (R. 2500-2505).

* * *

Unpublished District Court Opinion

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 87-4763

JAN 31 1991

ENTERED 1/31/91

CHARLES N. REED,

v.

PHILADELPHIA, BETHLEHEM & NEW
ENGLAND RAILROAD COMPANY.

MEMORANDUM

HUYETT, J. JANUARY 29, 1990

This is an action under the Federal Safety Appliance Act ("FSAA"), 45 U.S.C. §§1-43(a). A jury trial was held on August 21, 1990 through August 23, 1990, in which the jury found in answer to special interrogatories that the defendant Philadelphia, Bethlehem & New England Railroad Company ("PBNE") had *not* violated the FSAA.[1] On August 28, 1990, the Clerk entered judgment in favor of defendant PBNE and against plaintiff Charles N. Reed.

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[1] Special interrogatory Number 1 asked: "Do you find that the defendant violated Section 2 of the Federal Safety Appliance Act?" The jury answered "no." *See* Tr. 8/23/90 at p. 113.

Plaintiff has filed a motion for a new trial, and defendant has responded. In his motion, plaintiff raises many issues. In this Memorandum, I shall discuss six of those issues. Any issues raised by plaintiff which I do *not* discuss in this Memorandum have been considered and found to be without merit.

[2] I. DISCUSSION

A.

First, plaintiff contends that this Court committed error when, subsequent to the closing argument of plaintiff's counsel, it permitted defendant's counsel to respond to the misleading and prejudicial arguments made by plaintiff's counsel during his closing. This Court noted during a sidebar conference that plaintiff's closing argument was unfair in tone, nature, and content. While the written record does not disclose the inflammatory and emotional performance by plaintiff's counsel, the substantive accusations began with the alleged "callousness" of defendant:

> But this isn't the end. The most callous, the most indifferent, the hardest thing that I could comprehend they tried to do to you yesterday. What did they tell you? They brought somebody up on the witness stand to say, oh, 85 percent of our people retire at age 82 [sic].
>
> They told you that because they wanted you not to award Charlie any money. Hey, if he could have retired at 82 [sic], how much is his case worth? *They treated Charlie like the junk that they carries* [*sic*] *in these things.*
>
> * * * *
>
> Is this how you treat someone who gave you their entire life? By bringing in no witness? By making fancy arguments from different parts of pages?

> And then do you treat this person by telling the jury, don't give him anything, he could have retired anyway. Yeah, well Mr. Reed didn't want to retire anyway. Mr. Reed could have worked until 70. He said he was going to work to 65 because that is the
> [3] time when his son was going to graduate college. They don't have the right—they don't have the right to have you retire him at an early age and *it's callous and indifferent for them to even make that kind of argument.*
>
> Ladies and gentlemen, you are the collective conscience of this community. You represent the community and it's for you to say whether it's appropriate for a railroad—a Bethlehem Steel railroad to injure a man because their equipment is defective and in violation of the Safety Appliance Act and *then to try to deprive him of every right that he has under the law* by a Mr. Kovach with his phony report, by a Mr. Gartland or by some statistical basis as to how many people retire.

See Tr. 8/23/90 at pp. 22-23 (emphasis added). Plaintiff's counsel continued:

> Ladies and gentlemen, the life of a trial and the trial of life is the constant battle *between the callous and the concerned, the indifferent and the involved and between those who feel and those who forget.* A noted philosopher stated that man is the only animal that laughs and weeps, for he is the only animal that is struck with the difference with what things are and what they ought to be.
>
> Ladies and gentlemen, you have the power to make things what they ought to be. Thank you very much.

See Tr. 8/23/90 at pp. 30-31.

Because of this highly inflammatory and egregiously unfair emotional appeal, this Court granted defense counsel's request and permitted him to tell the jury

enough to neutralize the unfairness created by plaintiff's counsel. I permitted defense counsel to comment that plaintiff had *not* been cast aside and that he was on disability.

[4] Consistent with this ruling, defendant's counsel's entire comment about which plaintiff complains consists of twelve words out of the entire transcript:

> Mr. Barish has made comments about my clients and my callousness, disregard, et cetera. We have not cast Mr. Reed aside. Mr. Reed has been taken care of. Mr. Reed is being provided disability through a Federal system and by the company, and we have not been callous or [sic] disregard of Mr. Reed [sic] welfare or his—
>
> MR. BARISH: If the Court please—
>
> MR. BERGHOLTZ: —or his years of service with the company.

It was a brief and unrepeated part of the lengthy closing arguments of counsel (covering over 26 pages of text). It was permitted merely to counter the unfair and prejudicial position in which plaintiff's counsel had placed defendant PBNE and its counsel. It was a response which I concluded was invited by plaintiff's counsel.

The principles of law which control this alleged error are broad and well-settled. "The trial judge is in a far better position than an appellate court to evaluate the prejudice flowing from counsel's improper comments during trial and to determine the most effective response to ensure a fair trial." *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 765 (5th Cir. 1989) (citations omitted). *See also Ward v. H.B. Zachry Construction Co.*, 570 F.2d 892, 895 (10th Cir. 1978) ("Because the trial judge is in the best position to determine the effect that arguments of

counsel have upon the jury, considerable discretion is
[5] given to the trial judge in exercising supervision over arguments of counsel."); *Corbett v. Borandi,* 375 F.2d 265, 270 (3d Cir. 1967). Likewise, the Eleventh Circuit stated recently:

> Under federal law, the trial judge is given considerable discretion to control the tone of counsels' arguments and, absent an abuse of discretion, the decision of the trial court, which has had the opportunity to hear the offensive remarks within the context of the argument and to view their effect on the jury, should not be disturbed.

Allstate Insurance Co. v. James, 845 F.2d 315, 318 (11th Cir. 1988) (citation omitted). *See also Canada Dry Corp. v. Nehi Beverage Co.,* 723 F.2d 512, 527 (7th Cir. 1983) (trial court's discretion to determine whether counsel's remarks require admonition to the jury will only be upset for clear abuse).

Under these authorities and in these particular circumstances, given the tone, nature, and content of plaintiff's counsel's intentionally inflammatory, prejudicial and untrue remarks, the brevity of defendant counsel's responding comment, and this Court's reminders to the jury that statements of counsel are *not* evidence (*See* Tr. 8/21/90 at p. 32, and 8/23/90 at p. 72), I conclude that I handled this matter appropriately and preserved the fairness of the trial which plaintiff's counsel so blatantly threatened.

Plaintiff argues that this Court's supervision of his counsel's conduct was reversible error because it violated the collateral source rule. The cases which plaintiff cites, however, deal with either the issue of admissibility of evidence of collateral benefits or with extended
[6] arguments based directly on the receipt of collateral benefits. As the record demonstrates, I was *not* dealing

with an evidentiary issue or an argument based on the receipt of benefits, but rather was attempting to combat the egregious unfairness caused by plaintiff's counsel's improper argument. This Court did *not* permit, nor did defendant's counsel make, any substantive argument based on the brief remedial comment. The solution to the problem was "within the sound control and discretion of the trial judge," *Arkwright Mutual Insurance Co. v. Philadelphia Electric Co.*, 427 F.2d 1273, 1277 (3d Cir. 1970). In this case, the solution that I chose merely leveled the playing field.

In addition, the jury found in favor of PBNE on liability. Collateral benefits relate to the damages portion of the case. Given the serious injury to plaintiff, it is impossible to conclude, and plaintiff nowhere even attempts to explain, that "an element going really only to damages could result, not in a finding of no [perhaps low] damages, but one which completely exonerated the railroad." *Franklin v. Sandersville Railroad Co.*, 445 F.2d 270, 271 (5th Cir. 1971). Accordingly, I conclude that this Court did *not* commit reversible error by permitting defendant's counsel the opportunity to respond to the misleading and prejudicial arguments made by plaintiff's counsel during his closing argument.

B.

Second, plaintiff argues that this Court's failure to instruct the jury on his two theories of liability warrants
[7] a new trial. Plaintiff describes these theories as (1) "the cutting lever on the car failed to operate properly" and (2) "the cars failed to automatically couple on impact." *See* Plaintiff's Memorandum of Law at p. 7. Plaintiff contends that this Court did *not* cover these two theories in its charge to the jury.

Nothing could be further from the truth. As to plaintiff's theories of liability, I specifically charged the jury:

> Plaintiff claims that, at the time and place in question, the defendant violated the Federal Safety Appliance Act because (1) the coupler mechanism on the railroad cars failed to couple automatically on initial impact, and (2) that the cutting lever, part of the coupler mechanism, failed to function properly requiring plaintiff to step between the railroad cars in order to properly align the railroad cars for coupling. Plaintiff further alleges that his injuries were caused by either or both of these failures of the coupler mechanism to function properly at the time and place in question.

See Court's Written "Jury Instructions"[2] at p. 3; *see also* Tr. 8/23/90 at pp. 77-78. The charge directly contradicts plaintiff's unfounded allegations that "the Court did no more than mention the cutting lever" and that the only instruction given involved failure of the cars to couple automatically on impact.

Accordingly, the cases which plaintiff cites on pages 9 through 13 of his Memorandum of Law which deal with
[8] the consequences of a failure to instruct are irrelevant. The record unquestionably demonstrates that this Court properly instructed the jury on both of plaintiff's theories of liability. For plaintiff to claim otherwise is preposterous. This is particularly true given the following comment by plaintiff's counsel:

> In your charge, your Honor talks about two theories that the plaintiff has. One is a failure to couple, and the other, that the cutting lever was defective.

See Tr. 8/23/90 at p. 87.

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[2] This Court gave each juror a written copy of the substantive part of the charge which was read to the jury. As a result of objections made by plaintiff's counsel following the charge, this Court supplemented the substantive part of the charge with oral comments.

Moreover, at the request of plaintiff's counsel following the charge and with his approval, this Court repeated plaintiff's two theories of liability in an oral supplement to the charge:

> I want to tell you that you should consider my charge as a whole. And I'm going to tell you two other things and you should consider these things which I am going to tell you orally along with the written materials which you have and consider all this as a whole when you consider my instructions as to the law.
>
> And let me first say to you, as I mentioned to you, members of the jury, plaintiff has two theories of a violation of the Federal Safety Appliance Act. May I tell you that defendant's defense of misalignment applies only to plaintiff's first theory of a violation that the coupler mechanism on the railroad cars failed to couple automatically on initial impact.
>
> Plaintiff may also prove a violation of the Act by establishing that the cutting lever part of the coupler mechanism failed to function properly, requiring plaintiff to step between the railroad cares in order to properly align the railroad cars for
> [9] coupling. Defendant's defense to this theory is that the cutting lever was operable at the time of the accident.

See Tr. 8/23/90 at pp. 105-06.

The supplement to the charge repeated plaintiff's two theories of liability and elaborated on the fact that the misalignment defense applies only to the failure to couple theory of liability. Nothing in the record suggests that plaintiff "specifically requested a peremptory charge" on the other theory of liability—the inoperative cutting lever. *See* Plaintiff's Memorandum of Law at p. 13. In fact, what plaintiff's counsel actually requested was for

the court to consider adding language to reflect that misalignment is *not* a defense to the cutting lever theory. This Court properly rejected this request because it was unnecessary and repetitious. *See* Tr. 8/23/90 at p. 94. Because this Court's supplement clearly stated that the defense of misalignment applied "only" to plaintiff's failure to couple theory, I did not err in denying plaintiff's superfluous request. *Dawsey v. Olin Corp.*, 782 F.2d 1254, 1266 (5th Cir. 1986) (not error to refuse to give requested instruction as long as substance of it has been adequately covered elsewhere in court's charge).

I reminded the jury that the additional charge supplemented the charge already given: "And let me say to you, as I mentioned to you, members of the jury, plaintiff has two theories of a violation of the Federal Safety Appliance Act." Then, I went on to explain the two theories again, including the cutting lever theory. It
[10] is incredible that plaintiff now argues, without support, that the supplement to the cutting lever theory, made at plaintiff's counsel's request, "was legally insufficient to constitute a charge and constitutes reversible error." In making such a claim, plaintiff ignores completely the first part of the charge dealing with the cutting lever included in the written jury instructions. Moreover, not only did plaintiff's counsel fail to object to the supplemental charge, he actually requested and approved it.

Plaintiff's next argument concerns the fact that the written instructions were distributed to the jury. First, the written instructions are the same as the charge given and clearly include both of plaintiff's liability theories. Second, in its supplement to the charge, this Court reminded the jury to consider its charge "as a whole." *See* Tr. 8/23/90 at p. 105. *See Ramsey v. American Air*

Filter Co., 722 F.2d 1303, 1312 (7th Cir. 1985) (in reviewing adequacy of jury instructions, reviewing court must look to the instructions as a whole, in a common sense manner, avoiding fastidiousness); *SEPTA v. Transit Casualty Co.*, 412 F. Supp. 839, 845-46 (E.D. Pa. 1976) ("in determining if there is error in the Court's charge it must be read as a whole").

C.

Plaintiff also maintains that this Court violated Rule 51 of the Federal Rules of Civil Procedure by failing to instruct the jury on both of plaintiff's theories of liability as promised to plaintiff's counsel in the charge conference.

[11] The record demonstrates that this Court instructed the jury twice on each of plaintiff's liability theories—i.e., the failure to couple on initial impact and the failure of the cutting lever to operate properly. Consequently, there is no violation of Rule 51 of the Federal Rules of Civil Procedure. This Court adequately instructed the jury on the principles and concepts governing plaintiff's liability theories, including the cutting lever theory. This Court did *not* err in using its own language in the instructions, rather than the language submitted by plaintiff.

> The purpose of a jury charge is to convey legal concepts to a jury of lay persons. Trial judges may choose from an extensive dictionary of terms, words that adequately express the appropriate precepts. If the instructions are accurate in substance and understandable to lay persons, the failure to use the exact words requested by counsel is not reversible error.

Williams v. Mussomelli, 722 F.2d 1130, 1134 (3d Cir. 1983). *See also McKinnon v. Skil Corp.*, 638 F.2d 270, 274 (1st Cir. 1981) ("court need not employ the precise

language urged"). In fact, the record discloses that the liability instructions submitted by plaintiff were generally incomplete, argumentative, confusing, repetitious, and inappropriate for a jury. *See* Tr. of Charge Conference at pp. 18-22.

Moreover, even if there had been a technical violation of Rule 51, to be reversible any such error must have resulted in prejudice to one of the parties. *Acosta v. Honda Motor Co.*, 717 F.2d 828, 843 (3d Cir. 1983).
[12] Despite claiming error, plaintiff does *not* explain how he was prejudiced. Nor could he. The record demonstrates that the Court did not abuse its discretion in ruling on plaintiff's requested instructions. Furthermore, viewing the charge as a whole, it fairly, accurately, and properly submitted the issues to the jury. *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 922 (3d Cir. 1986) (standard of review for ruling on points for jury charge is an abuse of discretion; once court has given the jury charge, question is whether the charge, taken as a whole and in light of evidence, fairly and adequately submits issues to the jury).

D.

Next, plaintiff contends that this Court committed reversible error it charging the jury on the defense of misalignment, for which plaintiff asserts there was no legal or evidentiary support.

The law recognizes that a failure of automatic couplers to couple because of a misaligned drawbar is *not* a violation of section 2 of the FSAA which provides in pertinent part:

> It shall be unlawful for any railroad to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by

> impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U.S.C. §2.

Decades ago, in *Atlantic City Railroad Co. v. Parker*, 242 U.S. 56 (1916), Justice Oliver Wendell Holmes recognized that "[s]ome lateral play must be allowed to drawheads, and further the car was on a curve which, of
[13] course, would tend to throw the coupler out of line." *Id.* at 59. Justice Holmes realized that when the normal, necessary lateral play of a drawbar creates a condition that prevents a coupling, no violation of section 2 of the FSAA occurs. In other words, unless the drawbar is properly aligned, a failure to couple is *not* a violation of section 2.

Thirty-four years after *Parker*, the Supreme Court similarly decided that a failure to couple violated section 2 of the FSAA "assum[ing] that the coupler was placed in a position to operate on impact." *Affolder v. New York, Chicago, and St. Louis Railroad Co.*, 339 U.S. 96, 99 (1950). The precise question in *Affolder* was "whether after the couplers were placed in open or proper position, they failed to couple automatically on impact." *Id.* Similarly in *Carter v. Atlantic & St. A.B.R. Co.*, 338 U.S. 430 (1949), the Court held that a defective coupler was one which failed to couple "if the coupler was properly set and failed to couple on the occasion in question." *Id.* at 434.

Accordingly, the Court in both *Parker* and *Affolder* adopt the rule that unless the entire coupling mechanism is first "properly set" (i.e., the drawbars aligned and at least one knuckle open), no violation of section 2 can occur. In *Cobb v. Union Railway Co.*, 318 F.2d 33 (6th Cir.), *cert. denied*, 375 U.S. 945 (1963), the Sixth Circuit approved an instruction reflecting the rule:

> The Court further charges you that if couplers fail to couple automatically because they are *not properly set for coupling under the circumstances,* this failure of the cars to couple is not a violation of the Safety Appliance Act, but if they fail to couple automatically by impact for any other reason, then
> [14] there would be a violation of the Safety Appliance Act. The Court further charges you that if you find by the preponderance of the evidence that cars did in fact fail to couple automatically on impact, you may infer from that fact but you are not required so to infer that the failure to couple was under such circumstances as to constitute a violation of the Safety Appliance Act.

Id. at 35-36. More recently, the Sixth Circuit accepted that "*Affolder* and *Cobb* . . . hold that no violation of §2 can be found unless the couplers were aligned and at least one knuckle open before the failed impact." *Clark v. Kentucky & Indiana Terminal Railroad,* 728 F.2d 307, 311 (6th Cir. 1984).

In *Maldonado v. Missouri Pacific Railway Co.,* 798 F.2d 764 (5th Cir. 1986), *cert. denied,* 480 U.S. 932 (1987), the Fifth Circuit put to rest any lingering doubts about the viability of the defense of drawbar misalignment. The Court in *Maldonado* stated that "drawbar misalignment should be a defense to failure to couple in instances where the misalignment which causes the noncoupling does not reflect defective or failed equipment." *Id.* at 768. In order to raise the misalignment defense, a railroad must "produce evidence tending to show that the misalignment was *not* due to equipment failure or defect." *Id.* (emphasis in original).

Both the law and the Federal Railroad Administration recognize that drawbars are *not* designed to remain in a perfectly straight and centered position. *See, e.g., United Transp. Union v. Lewis,* 711 F.2d 233 (D.C. Cir. 1983).

On the contrary, they must be and are designed to move off center position. Drawbars that slide and move
[15] provide slack and flexibility between cars and, thereby, avoid derailments as cars go around curves. Movement over track, vibration, or other normal operating conditions may cause a drawbar to move off center. In *Lewis*, the Court stated:

> That the knuckle on the coupler closes or that the drawbar goes out of alignment with the next car due to vibration or jarring does not indicate that the coupler is "defective." To be effective the coupling apparatus must permit limited lateral movement of the drawbar in order to allow the cars, when coupled together, to pass around curves without derailment and to allow coupling on a curve. Occasionally, drawbars move so far out of alignment as to preclude automatic coupling. It then becomes necessary to adjust the drawbar or the coupling knuckle, and this may require going between cars.

Id. at 235 n.5.

Next, plaintiff argues that the evidence in the record is *not* sufficient to support the charge on the defense of misalignment. In support of that position, plaintiff relies on "Mr. Laudenslager's entire relevant testimony."

Because plaintiff's counsel did *not* move for a directed verdict on this issue at the close of all evidence, this argument has been waived. "Sufficiency of the evidence is not reviewable on appeal unless a motion for direct[ed] verdict was made in the trial court at the close of all the evidence." *Dancey Co. v. Borg-Warner Corp.*, 799 F.2d 717, 721 (11th Cir. 1986). *See Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129, 132 (3d Cir. 1965) (failure to move for directed verdict at the close of all the evidence foreclosed party's right to raise issue as to the sufficiency of the evidence; court below may not be held

[16] to have erred on an issue which was not properly raised). Accordingly, plaintiff has waived any argument as to the sufficiency of the evidence with respect to misalignment.

Moreover, even absent waiver, the evidence was sufficient to support the misalignment charge. The testimony of plaintiff's witness Robert Laudenslager is sufficient to permit an inference that the initial failure to couple occurred either because Mr. Laudenslager did *not* properly align the drawhead[3] or because the drawhead moved through its normal play as the scrap car rolled over the scale. *See* Tr. 8/21/90 at p. 62, pp. 72-74, and pp. 77-78. Accordingly, this testimony is sufficient to support a charge on the defense of misalignment because it demonstrated a failure to couple caused by something other than a defect in the equipment.

In addition, plaintiff testified that when the cars initially hit together, he could see that the drawheads were *not* aligned:

> Q. And as you were watching the cars, Mr. Reed, you saw that the couplers were not aligned, did you not, as they were coming together?
>
> A. I assumed that when they hit they weren't aligned.
>
> Q. You did not see that?

[17] A. I couldn't see from that distance if they were not aligned. I only assume [sic] it after the accident happened that they were aligned—weren't aligned.

MR. BERGHOLTZ: May I approach the witness again?

THE COURT: Yes.

* * * *

[3] On direct examination, Mr. Laudenslager testified that he had aligned the drawhead before he sent the scrap car over the scale. *See* Tr. 8/21/90 at p. 64. However, on re-direct, he testified that he was *not* sure if he aligned the drawhead. *See* Tr. 8/21/90 at p. 78.

Q. Again, Mr. Reed, if I could direct your attention to page 37 where we had just left off at line 4:

Question: The knuckle on the other side, wasn't?

Answer: Wasn't open.

Question: You said they weren't lined up?

Answer: That's right.

Question: How do you know that?

Answer: I was standing about 20 feet away from the car on the side.

Question: And?

Answer: I could see it when they hit.

Question: So you saw when they hit?

Answer: I saw when they hit.

Question: That they weren't aligned?

Answer: That's right.

Q. Did I read that correctly?

That's right.

See Tr. 8/21/90 at pp. 149-51.

The jury could have reasonably and logically inferred that what plaintiff saw resulted from either Mr.
[18] Laudenslager not properly aligning the drawbar or from the normal play and movement of the drawbar after Mr. Laudenslager sent the car rolling over the scale. In sum, this case presented not only sufficient evidence to support an instruction on the defense of misalignment, but also compelling evidence from plaintiff and his witness.

Plaintiff also argues that this Court erred by *not* defining certain terms used in its charge. This argument lacks merit for two reasons. First plaintiff's counsel

never objected to the charge on definitional grounds or requested clarification of any terms. He had numerous opportunities to do so, given the charge conference and the colloquies over the charge. Consequently, this argument has been waived. Second, nothing in the record even remotely suggests that the charge misled or confused the jury. To the contrary, the record demonstrates that the jury understood the charge. Shortly after beginning deliberations, the jury returned with its only question—one that had nothing to do with the charge. *See* Tr. 8/23/90 at pp. 110-12.

In addition, plaintiff argues that this Court erred in the misalignment charge by misstating the applicable burden of proof. He tries to support this conclusion by selecting a portion of the charge and implying that this Court imposed an additional burden of proof upon plaintiff.

Again, plaintiff inappropriately focuses on a small portion of the charge and ignores the whole. *See Walters v. Mintec/International*, 758 F.2d 73, 76 (3d Cir. 1985)
[19] (alleged errors in jury instructions must be evaluated in light of the instructions as a whole). The portion of the charge cited by plaintiff appears on page 79 of the transcript from 8/23/90. To put that portion in context, preceding passages are important:

> Plaintiff need *not* establish that the coupler mechanism was defective. Plaintiff need only establish that, at the time of the accident, the coupler mechanism failed to perform and operate as required under Section 2 of the Federal Safety Appliance Act.

See Court's Written "Jury Instructions" at p. 2; *see also* Tr. 8/23/90 at p. 77.

> May I tell you, members of the jury, that plaintiff establishes a violation of section 2 of the Federal Safety Appliance Act by proving that, at the time and place of the accident, the railroad cars failed to couple automatically on impact.

See Court's Written "Jury Instructions" at p. 4; *see also* Tr. 8/23/90 at p. 78.

Turning to the defense of misalignment, the Court placed the burden of proof squarely on the railroad:

> With respect to this defense of misalignment may I tell you, members of the jury, that the defendant must present evidence to show that the misalignment did *not* occur because of equipment failure. In other words, the defendant has to establish a separate cause for the failure to couple other than equipment failure.

See Court's Written "Jury Instructions" at p. 4; Tr. 8/23/90 at pp. 78-79.

Once the charge on misalignment is placed in context, plaintiff's argument that this Court misstated the applicable burden of proof collapses. I instructed the
[20] jury concisely and properly that PBNE had the burden to prove its misalignment defense. *See Wilk v. American Medical Assn.*, 719 F.2d 207, 218 (7th Cir. 1983) (reviewing court looks to instructions as a whole, in a common sense manner, avoiding fastidiousness, inquiring whether the correct message was conveyed to the jury reasonably well), *cert. denied*, 467 U.S. 1210 (1984).

E.

At the charge conference, this Court reversed its prior ruling and withdrew from evidence the one safety rule which had been admitted. Consistent with this Court's ruling, PBNE's counsel did *not* refer to the safety rule

during closing argument. Nor did the Court mention the safety rule during its charge.

Plaintiff now alleges that this Court erred because it did *not* advise the jury to disregard defendant's safety rule. However, plaintiff's counsel did *not* request a cautionary or limiting instruction. *See* Fed. R. Civ. P. 51; *Harkins v. Ford Motor Co.*, 437 F.2d 276, 278 (3d Cir. 1970) (parties may *not* assign as error the failure to give an instruction unless they object to such failure before the jurors retire to consider their verdict). Therefore, as he did with his challenge to the sufficiency of the evidence, plaintiff has waived this argument. In addition, this Court specifically instructed the jury that the negligence of the plaintiff was not a defense. *See* Tr. 8/23/90 at p. 77.

Moreover, any error on this point was at best harmless. The safety rule was *not* mentioned in the
[21] closing arguments or during the charge. The safety rule was *not* included with the exhibits given to the jury during its deliberations. *See Link v. Mercedes-Benz of North America, Inc.*, 618 F. Supp. 679, 691 (E.D. Pa. 1985) (plaintiffs could *not* assign as error the failure to give a cautionary instruction on the hearsay issue before the jury retired in a situation in which plaintiffs did *not* propose cautionary instructions in their proposed points for charge, at the charge conference, or during a sidebar conference following the charge to the jury; moreover, failure to give such an instruction did *not* amount to "plain error" that would warrant a new trial), *aff'd in part and vacated in part on other grounds*, 788 F.2d 918, 926-27 (3d Cir. 1986).

F.

Finally, plaintiff's counsel contends that a new trial should be granted based on the newly discovered evidence that plaintiff's witness Joseph Gartland testified falsely to material facts which effected the outcome of this case.

Plaintiff's counsel, without factual or legal justification, accuses Mr. Gartland of testifying falsely. Consequently, he labels "perjury" what is at most inconsistencies between various witnesses' recollections of what happened or who was present in the time shortly after plaintiff's accident. He claims that Mr. Gartland's testimony that he was at the scene immediately after the accident and that photographs taken at that time accurately reflect the scene as it appeared to him is inaccurate. Plaintiff's counsel claims that he had no
[22] reason to anticipate the substance of Mr. Gartland's testimony. However, the record proves otherwise and shows conclusively that plaintiff is *not* entitled to a new trial.

Whether plaintiff claims a right to relief under Rule 60(b)(2) of the Federal Rules of Civil Procedure for newly discovered evidence or Rule 60(b)(3) for fraud, misrepresentation, or other misconduct, he is *not* entitled to relief on either basis. In *Posttape Associates v. Eastman Kodak Co.*, 68 F.R.D. 323 (E.D. Pa. 1975), *rev'd on other grounds*, 537 F.2d 751 (3d Cir. 1976), the Court stated:

> Relief under Rule 60(b)(2) is extraordinary relief which, in our sound discretion, we may grant only here extraordinary circumstances are present. A party is not entitled to a new trial on the grounds of newly discovered evidence unless "it . . . appear[s] that the evidence is not merely cumulative, that it

> could not have been discovered prior to trial through the exercise of reasonable diligence, and that the evidence is such as would probably change the outcome." Newly discovered evidence is "evidence 'of which the aggrieved party was excusably ignorant' at the time of trial." Relief under Rule 60(b)(3) is also extraordinary relief. The burden of demonstrating its appropriateness lies with the movant who must establish by clear and convincing evidence that the adverse party obtained the verdict through fraud, misrepresentation, or misconduct. We must deny a Rule 60(b)(3) motion if it is merely an attempt to relitigate the case or if we conclude that fraud has not been established.

Id. at 327. *See also Plattner v. Strick Corp.*, 102 F.R.D. 612, 614 (N.D. Ill. 1984).

The requirements are strictly enforced and, where the identity of witnesses is known before the trial,
[23] reasonable diligence requires the party to either depose the witnesses or produce them at trial. *Moore v. Rosecliff Realty Corp.*, 88 F. Supp. 956, 961 (D.N.J. 1950). In *Moore*, the court stated the strong policy reasons for strict application:

> These rules of law must be strictly enforced. If not strictly enforced, it would open the door for litigants to withhold available testimony, and then, if the result of the trial was adverse, resort could be had under the guise of newly discovered testimony to obtain another trial in which the litigants could correct the mistakes made in the former trial and perhaps secure a different result. The aim of the law should be to force litigants to the fullest preparation of their cases before trial. This can best be accomplished by strictly enforcing the principles of law governing new trial.

Id.

The record proves that plaintiff cannot meet any of the requirements to obtain a new trial pursuant to Rule 60 of the Federal Rules of Civil Procedure. First, the photographs in question were produced to plaintiff during discovery on November 11, 1987, more than three and one-half years before the trial. In addition, the witnesses from the railroad whose affidavits are attached to plaintiff's motion, as well as Mr. Achey, the photographer, were identified in answers to interrogatories served on plaintiff on November 24, 1987. Furthermore, the photographs, as well as all of the witnesses, except Mr. Achey, were listed in the Proposed Final Joint Pretrial Order filed on December 11, 1987. At no time prior to trial did plaintiff lodge any objection regarding the authenticity of the photographs.

[24] Second, plaintiff cannot properly claim ignorance or surprise regarding Mr. Gartland's testimony about his presence at the scene immediately after the accident or the position of the cars as reflected in the photographs. Mr. Gartland was listed in the Proposed Final Joint Pretrial Order as a liability witness to the "[p]osition of cars at time of the accident." In addition, on July 19, 1988, more than two years before trial, an affidavit by Mr. Gartland was filed as an exhibit to defendant's response to plaintiff's motion for partial summary judgment which reflects the substance of his trial testimony.

Finally, although plaintiff's counsel claims that it was *not* until subsequent to trial that he learned that the photographs were *not* taken immediately following the accident, the transcript shows that he at least believed that to be the case before the trial. On the first day of trial, defense counsel used photograph D-2 during the cross-examination of plaintiff's first witness, Mr.

Laudenslager. At that early stage, and for the first time in the three and one-half years after the Pretrial Order was filed, plaintiff's counsel objected as follows:

> MR. BARISH: Your Honor, if I may, I object to this photograph, primarily because there is no evidence as to when this was taken. *We have reason to believe that this was something that was taken sometime after the time in question.*

See Tr. 8/21/90 at pp. 71-72 (emphasis added).

Despite counsel's representation to this Court that he had some question regarding the authenticity of the photographs prior to trial, he chose *not* to ask Mr. Laudenslager a single question regarding their
[25] authenticity. Nor did he ask another witness, Mr. Dieter, any such questions. However, defense counsel elicited from both Mr. Laudenslager (*See* Tr. 8/21/90 at p. 71) and Mr. Dieter (*See* Tr. 8/22/90 at pp. 18-19) the fact that their recollections of the position of the cars after the accident were different from the photographs. In fact, their sworn testimony at trial is inconsistent with the affidavits now submitted by plaintiff in support of his motion for a new trial.

Mr. Laudenslager in his post-trial affidavit states specifically that: "No other cars were moved down the line. There were only two cars at the accident." However, when his recollection on that subject was tested during the trial he was *not* so certain:

> Q. And on this photograph [D-2] I believe you'll see that there is a box car and two scrap cars?
>
> * * * *
>
> Q. Mr. Laudenslager, I just want to be sure that you do not recall—
>
> A. No, I don't.

Q. Do you recall that this was not the situation immediately after the accident or do you just not recall one way or the other?

A. I'm not sure. I don't remember that.

See Tr. 8/21/90 at pp. 71-72.

Likewise, Mr. McFetridge in his post-trial affidavits offered in support of plaintiff's motion for a new trial claims that he inspected the car after it had been moved from the scale track. However, Mr. Dieter identified a report, plaintiff's Exhibit P-4, prepared by Mr. [26] McFetridge which disclosed that the car was on the scale track at the time of the inspection. *See* Tr. 8/22/90 at pp. 17-18. Finally, Mr. Laudenslager's affidavit states that he gave Mr. Gartland a statement at the yard office regarding the accident, shortly after it happened (at trial he testified that the statement was given within one-half hour of the accident, Tr. 8/21/90 at p. 76). The photographs show that the yard office is in the vicinity of the accident. Therefore, Mr. Laudenslager's affidavit, as well as those of Bright and Ziegler, confirm Mr. Gartland's testimony that he was at the scene of the accident within a short time after the accident.

Plaintiff's counsel chose not to ask Mr. Gartland a single question regarding the authenticity of the photographs, chose not to object to the introduction of the photographs, chose not to request a continuance, and chose not to introduce any rebuttal witnesses, although both Laudenslager and McFetridge were with plaintiff and his counsel throughout most of the trial.

The record provides no support for the claim of newly discovered evidence. The photographs, the identity of all potential fact witnesses, and the substance of Mr. Gartland's testimony regarding his presence at the scene and the position of the cars immediately after the

accident were all known to plaintiff's counsel long before trial. Reasonable diligence required plaintiff's counsel to either depose witnesses or otherwise investigate the situation. In fact, the discrepancies between the photographs, and testimony regarding them, and other witnesses' recollections of the situation were known to
[27] plaintiff's before trial. Furthermore, these inconsistencies were brought to the attention of the jury not by plaintiff's counsel but by defense counsel during cross-examination of two of plaintiff's witnesses. That the recollection of other witnesses also may have been inconsistent with the photographs or Mr. Gartland's testimony is merely cumulative and, therefore, *not* likely to change the outcome of the trial.

Plaintiff likewise finds no support for a claim of fraud or misrepresentation. Under Rule 60(b)(3), plaintiff must demonstrate the claimed "perjury" by clear and convincing evidence. As outlined above, the affidavits submitted by plaintiff do *not* establish even inaccurate testimony, let alone perjury. They reflect, at best, differences in recollections concerning who was where during the obviously hectic period of time immediately following the accident and the position of the railroad cars during that time.

Moreover, the affidavits themselves are internally inconsistent. Two of them claim that no more than five people were present at the scene of the accident. *See* Affidavits of Thomas Ryan and Richard McFetridge. Nevertheless, there are affidavits from five people, all of whom claim to have been at the scene of the accident, reporting variously that paramedics (*See* Affidavits of Robert A. Laudenslager, Thomas Ryan, John Bright, and Richard McFetridge), and Ed Christine (*See* Affidavit of John Bright), and other people "out of the shanty" (*See* Affidavit of Francis Ziegler) were present

[28] as well. In addition, some are inconsistent with the evidence plaintiff submitted at trial[4] and with plaintiff's position in this current motion.[5] Surely such conclusory and inconsistent affidavits do *not* and cannot sustain plaintiff's heavy burden of proving the claim of perjury by "clear and convincing evidence."

II. CONCLUSION

For the reasons stated above, I denied plaintiff's motion for a new trial by an order dated December 28, 1990.

DANIEL H. HUYETT
Daniel H. Huyett, 3rd, Judge

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[4] Mr. McFetridge's post-trial affidavit regarding the location of the car during his inspection with Mr. Dieter is inconsistent with the report prepared by McFetridge and Dieter and introduced at trial as Plaintiff's Exhibit P-4.

[5] While plaintiff's counsel claims that Mr. Gartland was *not* at the scene of the accident immediately after the accident, the post-trial affidavits submitted in support of plaintiff's motion for a new trial reflect that Mr. Gartland was present taking statements in the yard office, which the photographs show is in the immediate area of the accident.